BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERESO MEDRANO	)	
Claimant	)	
VS.	)	Docket No. 1,068,028
	)	
TYSON FRESH MEATS, INC.	)	
Self-Insured Respondent	)	

ORDER

Claimant requests review of the April 8, 2014 preliminary hearing Order Denying Compensation entered by Administrative Law Judge (ALJ) Pamela Fuller.

APPEARANCES

Scott Mann, of Hutchinson, Kansas, appeared for the claimant. M. Joan Klosterman and Carolyn McCarthy, of Kansas City, Missouri, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from April 7, 2014, with exhibits attached, the discovery deposition of Tereso Medrano from February 13, 2014, with exhibit attached, and the documents of record filed with the Division.

ISSUES

The ALJ found:

> [T]here is insufficient evidence to establish that the claimant's failure to lockout/tagout was without yielding to reason, obstinate or perverse. For the violation to be reckless, it must be something more than negligent. There must be a knowing or realization of danger to the person or another. Here, the claimant knew of the dangers of working on the machine without it being locked out. He knew that injury could result from his failure to lock the machine out. His failure to follow safety procedures was reckless.
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> Therefore, the claimant's request for temporary total disability compensation, payment of outstanding medical bills and his request for authorized medical treatment should be and the same is hereby denied.

Claimant requests review of whether claimant's violation of respondent's workplace safety rules was a "reckless violation" pursuant to K.S.A. 44-501(a) and whether respondent is precluded or estopped from asserting this affirmative defense on the basis that the lockout/tagout rules were not rigidly enforced by respondent pursuant to K.A.R. 51-20-1.

Respondent argues the ALJ's Order Denying Compensation should be affirmed.

FINDINGS OF FACT

As of February 13, 2014, claimant was 60 years old. He began working as a general mechanic for respondent in September 2001. Claimant's job duties included welding, changing motors and repairing bands and rollers. He worked 10-12 hours a day, with his normal hours being from 8 a.m. to 6:30 p.m.

Claimant acknowledged respondent conducted safety training videos monthly and also talked about safety every day. He further agreed he was to do a lockout/tagout every time he worked on a machine in order to prevent an accident. It was claimant's understanding that if he violated the lockout/tagout procedure he would be written up. Respondent has a policy regarding a "core safety violation" where someone who receives a violation will be terminated. Working on a machine without following the lockout/tagout procedure was a “core safety violation.”

On November 10, 2013, Arturo Gonzalez, claimant's supervisor, was contacted regarding a BM-5 machine that needed to be repaired. Mr. Gonzalez asked claimant to troubleshoot the machine as to why it needed repaired and then fix it. When claimant checked out the machine, one of the small bands was stuck and not working. Claimant tried to lock the machine, but the machine lock had been destroyed. He went back to the machine, opened the guard protector and tried to release the band using a hammer to pull on the band, “but it didn’t work, so he tried to do it with his hand, and that is when it grab his hand.”[1]

Claimant testified he could not lockout the machine due to the lock being destroyed, so he had to work on the machine while it was running. He did not want to shut down all of the machines because the production employees get mad and then claimant would be written up.

> Q. But the safety rules that you said you, you train on at Tyson, is it my understanding that you’re supposed to lock down the machine before working on it; is that right?

[1] Medrano Depo. at 23.

A. Yes.

Q. And if the lock is broken, then you were instructed to shut down production on that area of the plant; is that correct?

A. Yes.

Q. So the situation on, on this date, November 10th, 2013, did that require you to shut down that area of the plant?

A. Yes, all the sections. All the machines.[2]

While claimant testified he did not shut down all of the machines because he would get in trouble and the production employees would get mad, claimant admitted that he had never been reprimanded, sent home or written up for turning off the power to any of the machines while he was employed with respondent.[3] Claimant has turned off the main lines before and was not terminated for doing so. He admitted his mistake was trying to fix the machine fast on November 10, 2013.

Claimant was taken to the hospital and received treatment for his hand. Claimant returned to work on November 14, 2013, at which time he provided a statement to respondent regarding his work injury. Claimant was terminated by respondent on December 4, 2013, for the safety violation on November 10, 2013.

Due to the accident, claimant lost part of his index finger, most of the middle finger and his ring finger had to be reattached. The ring finger is not useable.

On July 7, 2003, claimant was given a written warning for locking out the slaughter 861D machine and then going home, leaving the machine still locked out. On December 29, 2008, claimant was given a three day suspension for failing to lockout/tagout a machine on which he was working. During his deposition, claimant acknowledged he was never to work on a machine with the power still on.

An Affidavit, from Jeremy Minton, respondent's Assistant Operations Manager dated March 1, 2014, provided to the court at the preliminary hearing on April 7, 2014,[4] stated claimant had the ability to lock out the machine on the date of the accident from the panel room without affecting any other machine in the production line. Claimant also had the authority to shut down any machine, including an entire production line, if necessary, in

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[2] *Id.* at 25.

[3] *Id.* at 30.

[4] P.H. Trans., Resp. Ex. 1.

order to safely work on a machine needing service. Working on a machine not properly locked out was strictly prohibited and was grounds for immediate termination.

Claimant argues he did not willfully violate respondent's safety policy nor did he willfully fail to use a safety guard and therefore his claim is compensable.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501 states in part:

> (a) (1) Compensation for an injury shall be disallowed if such injury to the employee results from:
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> (A) The employee's deliberate intention to cause such injury;
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> (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
>
> (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
>
> (D) the employee's reckless violation of their employer's workplace safety rules or regulations . . . .

K.S.A. 2013 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.A.R. 51-20-1 provides:

> The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

"Recklessness is a lesser standard of conduct than intentional conduct and requires running a risk substantially greater than the risk which makes the conduct merely negligent or careless."[5] While "the term recklessness is not self-defining," the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing "an unjustifiably high risk of harm that is either known or so obvious that it should be known."[6]

In *Wiehe*,[7] the Kansas Supreme Court quoted Restatement (Second) of Torts § 500(a) (1965), pp. 587-588:

> **Types of reckless conduct**. Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.
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> For either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk. . . .
>
> For either type of conduct, to be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.

Kansas criminal law defines reckless conduct in K.S.A. 2011 Supp. 21-5202(j):

> A person acts "recklessly" or is "reckless," when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard

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[5] *Robbins v. City of Wichita*, 285 Kan. 455, 470, 172 P.3d 1187 (2007) (paraphrasing *Safeco Ins. Co. America v. Burr*, 551 U.S. 47, 69, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007) citing, *inter alia*, Restatement [Second] of Torts § 500, p. 587 [1963-1964])).

[6] *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 68, 127 S. Ct. 2201, 2215, 167 L. Ed. 2d 1045 (2007) (citing *Farmer v. Brennan*, 511 U.S. 825, 836, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

[7] *Wiehe v. Kukal*, 225 Kan. 478, 483-84, 592 P.2d 860 (1979).

> constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

This Board Member agrees claimant recklessly violated a safety rule when he failed to lockout/tagout the machine. Claimant consciously disregarded a known or obvious risk which exceeded negligence. It is significant that claimant had been warned in the past for failing to lockout/tagout a machine. He had even been suspended for three days, a clear indication of the serious nature of the offense. The Order of the ALJ denying claimant benefits for recklessly violating respondent's safety policy is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant recklessly violated respondent's safety policy, resulting in injury to himself.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of ALJ Pamela Fuller dated April 8, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2014.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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[8] K.S.A. 2013 Supp. 44-534a.